Editor's note: 87 I.D. 473

U.S. STEEL CORP.

IBLA 77-228 Decided September 30, 1980

Appeals from decisions of the Utah State Office, Bureau of Land Management, requiring reimbursement of costs incurred in processing rights-of-way applications. FJ 14 U-35675 through U-35680.

Affirmed in part, reversed in part, and remanded.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976

   The Federal Land Policy and Management Act of 1976 authorizes the Bureau of Land Management to recover reasonable costs including costs of environmental analyses for applications of rights-of-way across public lands.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976

   Costs not directly associated with the processing or monitoring of a right-of-way application, such as evaluation of the mine to be served by the rights-of-way, are not authorized by the Federal Land Policy and Management Act of 1976 and are not reimbursable pursuant to 43 CFR 2802.1-2.

3. Accounts: Fees and Commissions--Accounts: Payments--Rights-of-Way: Applications

   Management overhead costs are not a reimbursable cost recoverable from right-of-way applicants under 43 CFR 2802.1-2.

APPEARANCES: Erie V. Boorman, Esq., Parsons, Behle & Latimer, Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

United States Steel Corporation appeals from decisions of the Utah State Office, Bureau of Land Management (BLM), requiring reimbursement of costs of processing right-of-way applications.

On November 9, 1976, appellant made application for five rights-of-way over Federal land to service the B-Canyon Coal Mine Project in Utah. Appellant's applications were for a telephone line (U-35676), tram road (U-35677), railroad (U-35678), water pipeline (U-35679) and powerline (U-35680) rights-of-way. In addition, appellants applied for a special land use permit (SLUP) covering 480 acres to be used as the site for the surface facilities and buildings to support the mining operation. Appellant submitted a total of $2,260 with the applications pursuant to 43 CFR 2802.1-2(a)(3).

By letter of February 1, 1977, appellant was notified that the statutes under which the applications were made had been repealed by sections 705(a) and 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2792-93. Appellant was informed that processing of the right-of-way applications would continue under the authority and requirements of Title V of FLPMA, 43 U.S.C. §§ 1761-71 (1976). Appellant specifically stated that it had no objection to amending the applications to conform to FLPMA. BLM informed appellant that, while processing of the SLUP would continue under FLPMA, BLM would hold the application until regulations concerning temporary use permits are promulgated.

On February 9, 1977, BLM informed appellant that it is required to reimburse the United States for the cost of processing right-of-way permit applications, including preparation of reports and statements concerning the impact of the proposal upon the environment. The letter states that it was issued in accordance with 31 U.S.C. § 483(a) (1976), FLPMA, and 43 CFR Subpart 2802. The letter continues:

> Based on available information and today's prices, the total estimated cost for processing the rights-of-way associated with your project is $50,000.
>
> As required by 43 CFR 2802.1-2(a)(4), we estimate our initial costs for February 1, 1977 through April 30, 1977, to be $27,260.00. Therefore, a bill for $25,000 is enclosed to cover our costs less $2,260 paid as filing fees.

Appellant paid the $25,000 and filed a notice of appeal as provided for in the letter of February 9, 1977. On September 1, 1977, BLM wrote appellant a letter to explain the new requirements for reimbursement of Federal costs incurred with the processing of right-of-way applications. Reference was made to P.L. 95-26, 91 Stat. 61 (May 4, 1977) and P.L. 95-74, 91 Stat. 285 (July 26, 1977) which provide for the expenditure of funds collected under sections 304(a),

304(b), 305(a), and 504(g) of FLPMA, 43 U.S.C. §§ 1734, 1735, and 1764 (1976). A new accounting system, commencing October 1, 1977, was established to process the funds. The letter stated that all cost recoverable work can be funded only from the new account. The letter went on to state: "This means that the deposits must be on hand to pay for the work or the work must stop because BLM has no other funding source." Appellant was billed $10,000 for estimated costs for the period October 1, 1977, through December 31, 1977. Appellant paid the amount and filed a second notice of appeal.

On March 17, 1978, appellant was billed $5,000 for what was described as "costs for on-going situations, processing of the draft environmental impact statement and processing of rights-of-way associated with this project." The letter stated that unless the payment is received, all work on the B-Canyon Coal Mine Project will cease. Appellant paid the $5,000 and filed a third notice of appeal.

On appeal, appellant objects to all of the required payments, except the $2,260 paid as filing fees. The validity of the regulations and BLM's authority under the regulations to require appellant to reimburse the United States for the costs of processing the right-of-way applications are challenged by appellant on a number of grounds. Appellant specifically argues that:

(1) The decisions are unauthorized by any valid existing regulation and are therefore invalid.

(2) The decisions are based upon improper, invalid, or an absence of standards used in setting the amount.

(3) The amount was determined in an arbitrary and capricious manner or inconsistent with applicable law and therefore constitutes an abuse of discretion.

(4) The recovery of costs relating to environmental studies constitutes an unreasonable fee or tax in violation of 43 U.S.C. §§ 1371 and 1374 (1976).

(5) The amount is excessive and therefore unreasonable in violation of 43 U.S.C. §§ 1371 and 1374 and therefore not fair and equitable in violation of 31 U.S.C. § 483a (1976).

(6) The decisions are invalid in that a large portion of the costs incurred is for environmental analyses which are incurred for the benefit of the general public, not for the exclusive benefit of appellant and therefore constitute an invalid tax.

(7) The cost of monitoring the rights-of-way benefits the general public and is therefore an invalid tax.

(8) The indirect costs are invalid either as costs benefiting the public generally or as management overhead which is not recoverable.

(9) The charges for mine plan evaluation are neither authorized by statute nor reasonably related to the processing of the right-of-way applications.

[1] Regulation, 43 CFR Subpart 2802, amended in 1975 to require right-of-way applicant to bear the costs associated with processing of a right-of-way application was initiated under the authority of the Independent Offices Appropriations Act of 1952, 31 U.S.C. § 483a (1976). Section 304 of FLPMA, 43 U.S.C. § 1734 (1976), specifically authorizes the Secretary of the Interior to establish "reasonable filing and service fees and reasonable charges, and commissions with respect to applications." Section 304(b) provides:

> The Secretary is authorized to require a deposit of any payments intended to reimburse the United States for reasonable costs with respect to applications and other documents relating to such lands. The moneys received for reasonable costs under this subsection shall be deposited with the Treasury in a special account and are hereby authorized to be appropriated and made available until expended. As used in this section "reasonable costs" include, but are not limited to, the costs of special studies; environmental impact statements; monitoring construction, operation, maintenance, and termination of any authorized facility; or other special activities. In determining whether costs are reasonable under this section, the Secretary may take into consideration actual costs (exclusive of management overhead), the monetary value of the rights or privileges sought by the applicant, the efficiency to the government processing involved, that portion of the cost incurred for the benefit of the general public interest rather than for the exclusive benefit of the applicant, the public service provided, and other factors relevant to determining the reasonableness of the costs.

The cost recovery provisions of sections 304 and 504(g) of FLPMA were implemented by Secretarial Order No. 3011, 43 FR 55280 (Oct. 14, 1977). The Secretarial order stated that the implementation shall apply to all applications for rights-of-way over public lands which were pending on October 21, 1976, or which have since been filed. The regulations at 43 CFR 2802.1-2 were specifically made applicable to applications for rights-of-way. 1/

1/ Regulation 43 CFR Part 2800 was amended effective July 31, 1980. 45 FR 44518 (July 1, 1980). The reimbursement of costs section of the

Appellant's assertions that the regulations are invalid, that the recovery of costs relating to environmental studies constitutes an unreasonable fee or tax, and that the portion of the costs incurred for environmental analyses and monitoring of the rights-of-way benefits the general public rather than appellant and is therefore invalid, have been addressed and answered by the Court of Appeals for the Tenth Circuit in Alumet v. Andrus, 607 F.2d 911 (1979). In Alumet the court stated:

> Clearly, FLPMA is an express legislative mandate that all reasonable costs incurred by the Secretary in processing an application for rights-of-way on public lands shall be chargeable against the applicant for such rights-of-way, and further, that "reasonable costs" include, among other things, the costs of environmental impact statements. We shall assume that Congress was aware of its limitations in delegating the authority to "tax."

607 F.2d at 916.

The Alumet court did not address the issue of whether the full costs of an environmental statement (EIS) can be recovered from a right-of-way applicant. The court overturned the rule of the district court below that section 304 of FLPMA did not authorize the Secretary of the Interior to seek reimbursement from an applicant for any part of the costs of preparing an EIS. In Colorado-Ute Electric Association, Inc., 46 IBLA 35 (1980), 2/ this Board following Miss. Power & Light v. U.S. Nuclear Regulatory Comm., 601 F.2d 223 (5th Cir. 1979), cert. denied, 100 S.Ct. 1066 (1980), held that BLM may recover the full costs of preparing environmental studies associated with right-of-way applications. Although neither Colorado-Ute nor Miss. Power & Light arose under FLPMA, the rational of both cases is equally applicable in this instance. The environmental studies and reviews are an integral part of the right-of-way application and as such directly benefit the applicant in this instance.

Congress implemented the revolving account established in section 304(b) of FLPMA through the Department of the Interior and Related Agencies Appropriations Act for fiscal year 1978, P.L. 95-74, 91 Stat. 285 (1977). The moneys collected under sections 304(a),

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fn. 1 (continued)
amended regulation is virtually unchanged from the regulation promulgated in 1975. Application of the amended version of the regulation to the facts presented by this appeal would not benefit appellant. See Henry Offe, 64 I.D. 52, 55-56 (1957). It should be noted that order No. 3011 expired, by its own terms, when regulations were promulgated.

2/ Appeal pending, No. 80C-500 (D. Colo. Apr. 16, 1980).

304(b), 305(a), and 504(g) of FLPMA, are the only funds appropriated by Congress for processing right-of-way applications. This process of appropriation has been continued through fiscal year 1980 and is the only source of funds available for preparation of environmental impact statements associated with rights-of-way over Federal lands.

[2] Appellants contend that the charges for mine plan evaluation are neither authorized by statute nor reasonably related to the processing of the right-of-way applications. The record shows in the "calculation of costs" that mine plan evaluation comprises some $10,000 of the $50,000 total estimated costs. Appellant's contention on this point has merit. While recovery of all costs associated with right-of-way applications including the costs of preparing environmental studies is mandated by FLPMA, the same does not hold true for the cost associated with evaluating the base operation that the rights-of-way will serve which in this instance is the mine itself. 30 CFR 211.10 authorizes the regional director of the Office of Surface Mining to review and consider a proposed mining plan. To the extent that BLM was involved in evaluating the mine plan under 43 CFR Subpart 3041 (1978) 3/ such review is not reimbursable under the right-of-way regulations since it does not pertain to the right-of-way application. The amount contributed to mine plan evaluation is to be refunded to the appellant pursuant to section 304(c) of FLPMA, 43 U.S.C. §1734(c) (1976).

Appellant asserts that the calculation of costs was either determined in an arbitrary and capricious manner and/or based upon improper and invalid standards. The February 9, 1977, BLM decision lists the following costs that are reimbursable:

> 1. Salary, per diem, and travel of all personnel involved in actual processing of applications, such as record keeping, field examination, adjudication, Environmental Analysis Reports/Environmental Impact Statements, etc.
>
> 2. Costs of contracts, fees of consultants, costs of public meetings and hearings, and costs of other special arrangements made to assist in the processing of the applications.
>
> 3. Purchase and hire of special materials and equipment, including photos, maps, data, etc.

3/ Regulation 43 CFR Subpart 3041 was deleted in its entirety and its provisions transferred to 30 CFR Chap. VII, 30 CFR Part 211, and 43 CFR Part 3460. 44 FR 42650 (July 19, 1979), corrected 44 FR 56340 (Oct. 1, 1979).

4. Extra incremental costs incurred for accelerating planned cadastral surveys, Management Framework Plans, and field examinations for the benefit of the applicant.

The above costs are the type of costs contemplated by FLPMA and the implementing regulations. The amount charged is only that amount necessary to evaluate the right-of-way applications pursuant to FLPMA. There is no indication that BLM has utilized money from the revolving fund for other than proper purposes. It was not intended that there be a standard used in setting the amount, rather it was intended that the applicant bear the full costs of processing the right-of-way application.

[3] Appellant also challenges the indirect costs assessed against it as either invalid as costs benefiting the public generally or invalid as management overhead which is not recoverable by statute. The record does not show that indirect costs were factored into the computation of the amount of assessable costs billed to appellant, however, Organic Act Directive No. 77-65 dated August 12, 1977, provides that "billings for costs recoverable work to be performed during the remainder of FY 1977 will continue to include 22% of direct costs to finance the applicable share of indirect costs." As was the case in Colorado-Ute, supra, we are unable to determine whether indirect costs were charged to appellant, and if so charged whether a portion of the indirect costs was a charge for "management overhead" which is not permissible. Accordingly, we remand the case to BLM for a determination whether indirect costs were factored into the costs charged to appellant and whether any of those costs were charges for management overhead. Of course, no indirect costs of any kind would be allowable as a surcharge to the $10,000 charged to the mine plan evaluation.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, reversed in part, and remanded for action consistent with this decision.

Frederick Fishman
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Douglas E. Henriques
Administrative Judge